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No. 95-1497

In the Supreme Court of the United States

OCTOBER TERM, 1995

RICHARD A. CRAMER, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, when petitioners intentionally and without adequate disclosure took a position in their income tax returns that they knew was contrary to the applicable regulation and thereby substantially understated their income tax liability, their purported reliance on professional advice excuses them from additions to tax for intentional disregard of rules and regulations under Section 6653(a) of the Internal Revenue Code, 26 U.S.C. 6653(a), and for substantial understatement of liability under Section 6661(a) of the Code, 26 U.S.C. 6661(a), as in effect for the year in suit.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes and regulations involved	2
Statement	2
Argument	11
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Accardo v. *Commissioner*, 942 F.2d 444 (7th Cir. 1991), cert. denied, 503 U.S. 907 (1992)	19
American Properties, Inc. v. *Commissioner*, 28 T.C. 1100 (1957), aff'd per curiam, 262 F.2d 150 (9th Cir. 1958)	18-19
Bagley v. *Commissioner*, 85 T.C. 663 (1985), aff'd, 806 F.2d 169 (8th Cir. 1986)	4
Betson v. *Commissioner*, 802 F.2d 365 (9th Cir. 1986)	15
Business Ventures International v. *Olive*, 893 F.2d 641 (3d Cir. 1990)	16
Chamberlain v. *Commissioner*, 66 F.3d 729 (5th Cir. 1995)	15
Daugherty v. *Commissioner*, 78 T.C. 623 (1982)	18
Druker v. *Commissioner*, 697 F.2d 46 (2d Cir. 1982), cert. denied, 461 U.S. 957 (1983)	15, 16
Durrett v. *Commissioner*, 71 F.3d 515 (5th Cir. 1996)	15
Gill v. *Commissioner*, 77 A.F.T.R. 2d 997 (6th Cir. 1996)	15
Goldman v. *Commissioner*, 39 F.3d 402 (2d Cir. 1994)	15
Hansen v. *Commissioner*, 820 F.2d 1464 (9th Cir. 1987)	14

Cases—Continued: Page

Hill v. *Commissioner*, 63 T.C. 225 (1974), aff'd *sub nom. Tenner* v. *Commissioner*, 551 F.2d 313 (9th Cir. 1977) 14, 16
Howard v. *Commissioner*, 931 F.2d 578 (9th Cir. 1991) 15
Mauerman v. *Commissioner*, 22 F.3d 1001 (10th Cir. 1994) 18
McMurray v. *Commissioner*, 985 F.2d 36 (1st Cir. 1993) 15
Pagel, Inc. v. *Commissioner*, 905 F.2d 1190 (8th Cir. 1990) 4
Pessin v. *Commissioner*, 59 T.C. 473 (1972) 19
Pritchett v. *Commissioner*, 63 T.C. 149 (1974) 19
Sim-Air USA, Ltd. v. *Commissioner*, 98 T.C. 187 (1992) 15
Tiffany Fine Arts, Inc. v. *United States*, 469 U.S. 310 (1985) 20
United States v. *Boyle*, 469 U.S. 241 (1985) 12, 13, 14

Statutes and regulations:

Internal Revenue Code (26 U.S.C.):
§ 83 ..... 2, 3, 4, 5, 7, 9, 10, 19
§ 83(a) 3
§ 83(a)(1) 3
§ 83(b) 3, 4, 6, 7, 10
§ 83(e)(3) 4
§ 6651 12
§ 6651(a) 12
§ 6653 2
§ 6653(a) 9, 10, 11, 15, 17
§ 6661 ..... 2, 17
§ 6661(a) 9, 10, 11
§ 6661(b)(2)(B) 17
§ 6661(c) 18
§ 6662 11
Treas. Reg. (26 C.F.R.):
Section 1.83-7 ..... 2, 3, 4, 5, 11, 13

Regulations—Continued:

	Page
Section 1.83-7(a)	4
Section 1.83-7(b)	9, 10

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-22a) is reported at 64 F.3d 1406. The opinion of the Tax Court (Pet. App. 30a-75a) is reported at 101 T.C. 225.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 1995. The petition for rehearing with suggestion for rehearing *en banc* that petitioners filed on November 15, 1995, with respect to the additions to tax imposed in this case was denied on

December 22, 1995.[1] Pet. App. 1a. The petition for a writ of certiorari was filed on March 19, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant portions of Sections 83, 6653, and 6661 of the Internal Revenue Code, 26 U.S.C. 83, 6653, and 6661, and of Section 1.83-7 of the Treasury Regulations on Income Tax, 26 C.F.R. 1.83-7, as in effect during the year in suit, are set forth at Pet. 2-6.

STATEMENT

1. In 1972, petitioner Richard Cramer founded IMED Corporation, which designed, manufactured, and sold electronic medical instruments.[2] Cramer was the chairman, president, and chief executive officer of IMED from the time of its formation until it was acquired by Warner–Lambert Company in 1982 (Pet. App. 4a). Petitioner Boynton was vice–president of IMED and petitioner Monaghan was general counsel to, and assistant secretary of, the corporation (*id.* at 4a, 33a). All three also served at various times as directors of IMED (*id.* at 4a). From 1978 through

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[1] A separate petition for rehearing was filed by petitioner Monaghan on November 16, 1995. That petition, which addressed only the underlying substantive tax issue, was denied on December 19, 1995—91 days before the petition for a writ of certiorari was filed. Pet. App. 2a. Petitioners do not now seek review of the underlying substantive tax determination.

[2] References to "petitioners" are to Richard A. Cramer (Cramer), Warren K. Boynton (Boynton), and Kevin P. Monaghan (Monaghan). Petitioners Alice D. Cramer, Susi M. Boynton, and Dina E. Monaghan are parties to this case solely because they filed joint income tax returns with their husbands for 1982.

1981, the stock of IMED was not publicly traded on an established stock exchange (*ibid.*).

In 1978 and 1979, IMED issued options to purchase IMED stock to petitioners (Pet. App. 4a-5a). The options were subject to restrictions on vesting and transfer that, when taken together with the fact that neither the options nor the underlying IMED stock was publicly traded, precluded the options from having a readily ascertainable fair market value under the standards set forth in Treas. Reg. § 1.83-7 (Pet. App. 4a, 5a).[3] The options were issued to

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[3] In general, the tax treatment of the receipt of property in connection with the performance of services is governed by Section 83 of the Internal Revenue Code, which requires the person who performs the services to include in his gross income the excess of the fair market value of the property over the amount, if any, paid therefor in the first taxable year in which the property is either transferable to others or not subject to a substantial risk of forfeiture. 26 U.S.C. 83(a)(1). The amount to be included in the recipient's income is the fair market value of the property determined as of the time the property becomes transferable or no longer subject to a substantial risk of forfeiture. *Ibid.* Any appreciation in the value of the property that occurs between the time of the receipt and the time the value of the property becomes includible in income under Section 83(a) is thus treated as ordinary income rather than as capital gains. In the alternative, the recipient of the restricted property may elect to include in his gross income for the year in which the property is received the excess of the fair market value of the property *at that time* over the amount, if any, paid for the property, in which event Section 83(a) will not apply with respect to the receipt of the property. 26 U.S.C. 83(b). Such an election has the effect of preventing any appreciation in the value of the property that occurs between the year of the receipt and the time the property otherwise would

petitioners in connection with the performance of personal services as employees of IMED. The delayed vesting schedules were intended to induce their continued employment with IMED (*id.* at 5a).

In 1978, Dan Hendrickson, an accountant who was the controller and treasurer of IMED, consulted with an accountant at Arthur Young & Co. concerning the IMED options. Hendrickson thereafter advised petitioners that, under Section 83(b) of the Internal Revenue Code, they would have to file elections to take the value of the options into income at the time the options were granted if they wished to have any chance of obtaining capital gains treatment for their options (Pet. App. 6a, 40a). He further informed them, however, that he believed (i) that the options did not have a readily ascertainable fair market value at the time they were granted and that, under Treas. Reg. § 1.83–7, elections under Section 83(b) were therefore unavailable and (ii) that the IRS could therefore take the position that any future disposition of the options would result in ordinary income rather than capital gains (Pet. App. 6a, 40a). He further advised petitioners that elections under Section 83(b) of the

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become includible in income under Section 83(a) from being treated as ordinary income.

The foregoing rules, however, do not apply to "the transfer of an option without a readily ascertainable fair market value." 26 U.S.C. 83(e)(3). If Section 83 does not apply to a nonqualified stock option because it does not have a readily ascertainable fair market value, then the recipient of the option realizes ordinary income when the option is exercised or otherwise disposed of in an arm's length transaction. Treas. Reg. § 1.83–7(a); *Pagel, Inc.* v. *Commissioner*, 905 F.2d 1190, 1191 (8th Cir. 1990); *Bagley* v. *Commissioner*, 85 T.C. 663, 671 (1985), aff'd, 806 F.2d 169 (8th Cir. 1986).

Internal Revenue Code might be permissible if Treas. Reg. § 1.83–7 was invalid (because contrary to the congressional intent expressed in a 1976 congressional committee report). But he informed them that successfully advancing a position contrary to the regulation would be most difficult (Pet. App. 6a, 40a).

Petitioner Monaghan, being a lawyer, was also involved in evaluating the position to be taken with respect to the IMED options (RT (Vol. VI) at 776–777).[4] To inform himself on this issue, Monaghan read some articles on the subject, read the statute (Section 83 of the Code), the regulations (Treas. Reg. § 1.83–7), and the 1976 committee report to which Hendrickson had referred. Monaghan understood Treas. Reg. § 1.83–7 to provide essentially that an option (like the IMED options) that was not traded on an established market did not have a readily ascertainable fair market value for purposes of Section 83. He read the 1976 committee report, however, as requiring the IRS to adopt a new and different regulation (RT (Vol. VI) at 783–784). He claimed to have concluded that the terms of the existing regulation should be disregarded in favor of the views expressed in the committee report (RT (Vol. VI) at 783–784). Monaghan discussed his conclusions with Boynton and Cramer (RT (Vol. III) at 245; RT (Vol. VI) at 779).

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[4] "CR" references are to the docket control numbers assigned by the Clerk of the Tax Court to the documents in the original record of *Cramer* v. *Commissioner*. "RT" references are to the reporter's transcript of proceedings (CR 53). "Exh." references are to the exhibits attached to the stipulation of facts (CR 45), attached to the first supplement to the stipulation of facts (CR 52) or admitted at the trial.

Cramer, Monaghan, and Hendrickson concluded that IMED should adopt the policy of causing elections under Section 83(b) to be filed with respect to all options it granted because, if elections were not filed, it would be certain that the options would be treated as ordinary income (RT (Vol. VI) at 778; RT (Vol. VII) at 840). In an attempt to obtain capital gain treatment upon future disposition of the options, petitioners filed elections under Section 83(b) with the IRS with respect to Cramer's 1978 option and the options granted to Boynton and Monaghan in 1979 (Pet. App. 6a). Even though petitioners believed that the options had value, their elections declared that the ascertainable fair market value of the options at the date of grant was zero (*ibid.*). No such elections were filed with respect to the options issued to Cramer in 1979 or the options issued in 1981 to an off-shore trust whose beneficiaries included petitioners (*id.* at 5a, 6a). Petitioners did not report any taxable income from the receipt of any of the options (*id.* at 6a).

In 1980, John Stine of Arthur Young took over the handling of the tax aspects of the IMED account (Pet. App. 7a). In 1981, petitioners inquired whether the period of limitations on assessing tax would run from the time of their Section 83(b) elections (Pet. App. 7a). Stine determined that it would not. He sent a letter to Hendrickson and Monaghan stating (*ibid.*):

> IMED currently takes the position that its stock options are governed by Section 83 and therefore the present tax treatment is . . . no income to the employee on grant or exercise and no compensation deduction to IMED. However, Regulation 1.83–7 states that an option must have a "readily

> ascertainable fair market value" before § 83 will apply. Since the definition of "readily ascertainable fair market value" is virtually impossible to meet, IMED's present position is subject to challenge.

Stine went on to suggest that IMED consider adopting a plan under the new rules pertaining to incentive stock options "in light of the potential exposure to exercising employees, should the IRS successfully assert the nonapplication of §83" (Pet. App. 7a). Monaghan discussed the letter with Cramer (*ibid.*).

In 1982, Warner–Lambert Company bought all of the outstanding stock of IMED. It also bought all of the outstanding unexercised IMED options, both vested and unvested, for the excess of the negotiated stock purchase price over the exercise price of the option (Pet. App. 7a). Cramer received nearly $67 million in connection with the sale of IMED to Warner–Lambert, of which approximately $26 million was attributable to the sale of his options (*ibid.*; Exh. 129). Boynton received almost $11 million from the sale, of which approximately $8 million was attributable to the options (Pet. App. 7a; CR 45 at 13–15; Exh. 8–H at Sched. D). Monaghan received more than $9 million, of which more than $2 million was attributable to the options (Pet. App. 7a).

Robert Jassoy, an accountant and former partner of Hendrickson, supervised the preparation of Cramer's and Monaghan's 1982 income tax returns (Pet. App. 43a). At the time he prepared Cramer's 1982 return, Jassoy had not seen either the options or the corporation's stock option plan. He was therefore not able independently to determine whether Section 83 of the Code applied to them (Pet. App. 43a). Jassoy was

informed that Section 83(b) elections had been timely filed for all years involved and that Arthur Young had determined that capital gain treatment of the option sale was appropriate (Pet. App. 64a). Monaghan told Jassoy that the transaction should be reported as giving rise to long-term capital gain (RT (Vol. VII) at 841). Based on the information given to him, Jassoy concluded that there was a reasonable basis for claiming long-term capital gain treatment for the dispositions of Cramer's and Monaghan's options (RT (Vol. V) at 488, 516). He advised Cramer and Monaghan of this, further advising them that the IRS might challenge the asserted capital gains treatment of the options (Pet. App. 65a; RT (Vol. V) at 529–531).

Cramer reported most of the proceeds of the sale of his options on his 1982 federal income tax return as long-term capital gain (failing, however, to report $1.3 million of the proceeds, which he claimed to hold on behalf of others). The option sale was reported on a schedule to his return entitled "Stocks & Bonds," even though there was also a different schedule to his return entitled "Options." Although Cramer knew that he had a zero basis in the options and had received sales proceeds of approximately $26 million, he misreported the options as having a basis of approximately $7 million and sales proceeds of over $32 million (Pet. App. 43a).

Monaghan reported the entire amount that he received as long-term capital gain on his 1982 federal income tax return. Like Cramer, Monaghan misreported the basis and sales proceeds of his options as being over $2 million and over $5 million, respectively, even though he knew that he did not have any basis in the options and that he received less than $3 million as the proceeds of their sale (Pet. App. 44a).

Boynton reported the entire amount that he received on his 1982 return as having been a sale of stock with zero basis—not a sale of options—resulting in long-term capital gain (Pet. App. 44a). Monaghan had told Boynton's accountant, Charles Wieseler, that the sale should be treated as long-term capital gain (RT (Vol. VII) at 841–842, 882–883). Wieseler was not provided with any of the option documents for review (Pet. App. 43a).

None of petitioners' 1982 income tax returns disclosed that the IMED options were subject to transfer and vesting restrictions, that the options and the underlying stock were not publicly traded, that petitioners had taken a reporting position that was inconsistent with the controlling regulation, or the basis for having taken such a position. Moreover, none of the returns reflected that elections to take the value of some of the options into income in an earlier year had been filed (Pet. App. 8a, 44a).

After auditing petitioners' 1982 returns, the Commissioner of Internal Revenue determined that the amount that petitioners realized from the sale of their options was compensation for services and thus ordinary income, not capital gain. The Commissioner determined income tax deficiencies accordingly and also determined that additions to the tax should be imposed for intentional disregard of rules and regulations under Section 6653(a) of the Code and for substantial understatement of tax under Section 6661(a) (Pet. App. 8a).

2. Petitioners sought review of the Commissioner's determinations in the Tax Court. The Tax Court held that Treas. Reg. § 1.83–7(b) is a valid interpretation of Section 83 of the Code (Pet. App. 59a-60a), that the options did not satisfy the require-

ments set forth in Treas. Reg. § 1.83–7(b) for an option that is not publicly traded to have a readily ascertainable fair market value (Pet. App. 49a-50a), and that petitioners had realized ordinary income from the sale of their IMED options (*id.* at 61a). The Tax Court accordingly upheld the Commissioner's determination of deficiencies in taxpayers' taxes for 1982.

The Tax Court also found that petitioners (i) knew that their options did not have a fair market value of zero at the time that they filed elections under Section 83(b) reporting zero value for the options (Pet. App. 45a), (ii) intentionally disregarded the applicable regulations in reporting long term capital gain from the disposition of the options on their 1982 tax returns (*id.* at 64a), (iii) did not act in reliance on the advice of tax professionals that their reporting position was correct (*id.* at 45a, 64a-67a), (iv) misreported the option sale on their returns in a manner that concealed its nature (*id.* at 68a, 69a) and (v) did not act in good faith (*id.* at 68a, 70a). The Tax Court therefore upheld the Commissioner's imposition of the additions to tax under Sections 6653(a) and 6661(a) of the Code.

3. The court of appeals affirmed (Pet. App. 22a). The court agreed with the Tax Court that Treas. Reg. § 1.83–7(b) is a valid interpretation of Section 83 of the Code, that under the regulation the IMED options did not have a readily ascertainable fair market value, and that petitioners therefore realized ordinary income upon the sale of their options (Pet. App. 14a-18a). The court of appeals also upheld the imposition of the addition to the tax for intentional disregard of rules and regulations under Section 6653(a) of the Code, noting that petitioners in fact

knew that capital gain treatment of the sale of their options was contrary to Treas. Reg. § 1.83–7 but that they nevertheless intentionally claimed capital gain treatment on their tax returns (Pet. App. 19a).

The court rejected petitioners' assertion that reliance on advice from their tax advisors excused them from the imposition of the addition to tax for intentional disregard of the regulation. The court observed that petitioners could have paid the tax and challenged the regulation in a refund suit but instead chose to "play the audit lottery" and lost (Pet. App. 20a). The court of appeals also affirmed the imposition of the addition to tax under Section 6661(a) for substantial understatement of tax, concluding that petitioners' position was not supported by substantial authority, that petitioners had not adequately disclosed the relevant facts on their tax returns, and that the Tax Court's finding that petitioners had not acted in good faith was not clearly erroneous (Pet. App. 21a-22a).

ARGUMENT

Petitioners challenge the imposition of additions to tax in this case. But the decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. As in effect during the years in issue, Section 6653(a) of the Internal Revenue Code provided for the imposition of an addition to the tax if any part of an underpayment of tax was due to negligence or intentional disregard of rules and regulations.[5] The

[5] The additions to tax for negligence and for intentional disregard of rules or regulations now appear in Section 6662 of the Internal Revenue Code.

Tax Court upheld the Commissioner's imposition of the addition to tax in this case because it found that petitioners were aware that their tax return position was contrary to the applicable regulations, which they intentionally disregarded (Pet. App. 65a-68a). Petitioners did not challenge those basic findings of fact on appeal (*id.* at 19a).

Petitioners nonetheless claim that they should be immunized from additions to tax in this case because they relied on professional advice in good faith. According to petitioners, the decision below is inconsistent both with this Court's decision in *United States* v. *Boyle*, 469 U.S. 241 (1985), and with decisions of other courts of appeals. Petitioners' asserted factual premise, however, is inconsistent with the record of this case. Their legal analysis is similarly flawed.

b. In *United States* v. *Boyle*, a taxpayer asserted that he should not have to pay a penalty under Section 6651(a) of the Code—for failing to file a tax return on time without "reasonable cause"—because he had relied on his attorney to file the return, and, through an inadvertent error, the attorney filed the return late. This Court rejected the taxpayer's argument, holding that "[t]he failure to make a timely filing of a tax return is not excused by the taxpayer's reliance on an agent, and such reliance is not 'reasonable cause' for a late filing under § 6651(a)" (469 U.S. at 252). Noting that *Boyle* was not a case in which "a taxpayer has relied on the erroneous advice of counsel concerning a question of law" (*id.* at 250), the Court stated that reliance on professional advice could be reasonable in that circumstance: "When an accountant or attorney *advises* a taxpayer on a matter of tax law, such as whether a liability exists, it is reason-

able for the taxpayer to rely on that advice." *Id.* at 251.

Petitioners contend (Pet. 16) that the decision in this case conflicts with *Boyle*. That contention, however, ignores both the substance of the advice that petitioners received and the nature of their actions. Petitioners were *correctly* advised that their reporting position—claiming capital gain treatment on the sale of their IMED options—was contrary to Treas. Reg. § 1.83-7 because the options did not have a readily ascertainable fair market value under the provisions of that regulation (Pet. App. 6a, 19a, 40a, 65a, 66a). They were further advised that, although they had a basis (the 1976 committee report) from which to argue that the regulation was invalid, that argument was difficult to make (*id.* at 6a, 40a, 65a). With that advice in mind, petitioners simply reported capital gains on the sale of their IMED options without disclosing on their returns the basis for that position (*id.* at 8a, 44a).

The Tax Court found that, in reporting capital gain on their options, petitioners were *not* acting in reliance on professional advice that they were doing what the law required (Pet. App. 45a). The court observed that "petitioners had serious doubts about the viability of their plan to obtain capital gain treatment upon the sale of the options but * * * they proceeded because they believed they had nothing to lose and had a large incentive to try" (*id.* at 66a). Being fully advised as to their doubtful position under the applicable law, petitioners took a calculated risk. In an effort to obtain capital gain treatment, they adopted a tax reporting position that, to their knowledge, was contrary to the controlling regulation. As the court of appeals put it, petitioners "decided to

ignore" the regulation on the theory that it was invalid and, instead of making a direct challenge to the validity of the regulation, they "chose to play the audit lottery" and "[t]hey lost" (*id.* at 20a).

This is not a case in which petitioners, unfamiliar with the law, relied completely on decisions made and advice given by their advisors. Cf. *Hill* v. *Commissioner*, 63 T.C. 225, 251-252 (1974), aff'd *sub nom. Tenner* v. *Commissioner*, 551 F.2d 313 (9th Cir. 1977). Instead, petitioners, having been advised that their position was contrary to the applicable regulations and was subject to challenge by the IRS, deliberated among themselves as to whether to comply with the regulations and decided that they would not. The factual setting of this case is thus far removed from the type of reliance on professional advice that this Court referred to as "reasonable" in *Boyle*, 469 U.S. at 251.

Petitioners not only knew of the regulation and chose among themselves to ignore it. They also took steps to conceal their action by including false statements on their returns concerning the basis of their options (Pet. App. 22a). The facts of this case thus plainly distinguish it from the hypothetical, innocent and reasonable reliance on professional advice that was postulated by the Court in the *Boyle* case. As the court of appeals explained in this case, "[i]ntentional disregard occurs when a taxpayer *who knows or should know of a rule or regulation chooses to ignore its requirements*" (Pet. App. 19a, quoting *Hansen* v. *Commissioner*, 820 F.2d 1464, 1469 (9th Cir. 1987) (emphasis added)). Petitioners' conduct brought them directly within the scope of this penalty provision.

2. a. Petitioners also err in contending (Pet. 17-19) that the decision in this case conflicts with decisions of other circuits. All but one of the cases on which petitioners rely under Section 6653(a) of the Code involve the negligence penalty, not the addition to tax for intentional disregard of rules and regulations.[6] While a taxpayer's reasonable reliance on the advice of a tax professional that the taxpayer is doing what the law requires may shield the taxpayer from the negligence penalty, it has no bearing on the different standard applicable to a taxpayer who, being fully advised that he is taking a reporting position directly at odds with a governing regulation, nevertheless decides intentionally to disregard that regulation. As the Second Circuit correctly observed, "[t]he reasonableness of a taxpayer's action may indeed be relevant when he is charged with negligence but not when he admittedly has flouted applicable rules and regulations which he fully understood." *Druker* v. *Commissioner*, 697 F.2d 46, 53 (2d Cir. 1982), cert. denied, 461 U.S. 957 (1983). This is so even when the taxpayer had disregarded a regulation in reasonable reliance on advice of counsel that the regulation in question was invalid. See *id.* at 54. "[A] taxpayer is required to pay taxes due pursuant to issued rules and regulations, and sue for a

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[6] *Gill* v. *Commissioner*, 77 A.F.T.R. 2d 997, 1002 (6th Cir. 1996); *Durrett* v. *Commissioner*, 71 F.3d 515, 518 (5th Cir. 1996); *Chamberlain* v. *Commissioner*, 66 F.3d 729, 733 (5th Cir. 1995); *Goldman* v. *Commissioner*, 39 F.3d 402, 407 (2d Cir. 1994); *McMurray* v. *Commissioner*, 985 F.2d 36, 43 (1st Cir. 1993); *Howard* v. *Commissioner*, 931 F.2d 578, 582 (9th Cir. 1991); *Betson* v. *Commissioner*, 802 F.2d 365, 372 (9th Cir. 1986); *Sim-Air USA, Ltd.* v. *Commissioner*, 98 T.C. 187, 198 (1992).

refund, or risk paying penalties if the [substantive tax] position of the Internal Revenue Service is upheld by the courts." *Business Ventures International* v. *Olive*, 893 F.2d 641, 646 (3d Cir. 1990).

b. The only case that petitioners have cited that indicates that reliance on advisors may relieve a taxpayer from the addition to tax for intentional disregard of rules or regulations is *Hill* v. *Commissioner*, 63 T.C. 225, 251-252 (1974), aff'd *sub nom. Tenner* v. *Commissioner*, 551 F.2d 313 (9th Cir. 1977). That case involves plainly distinguishable facts. In *Hill*, the Tax Court was unable to conclude that the taxpayers were aware that their reporting position was inconsistent with rules or regulations. As the court explained in *Druker* v. *Commissioner*, 697 F.2d at 54, the decision in *Hill* "relied on the fact that the taxpayers themselves did not know what they were doing." By contrast, petitioners in this case unquestionably knew that they were taking a position that was expressly in conflict with the provisions of the controlling Treasury regulation, chose to disregard the regulation, and took steps to conceal their action by misstating relevant facts in their returns.

3. a. Petitioners contend that the court of appeals improperly attributed to them errors made by their tax return preparers in finding that petitioners did not act with "reasonable cause" (Pet. 22). The court of appeals pointed to the fact that petitioners misreported the options transactions on their returns and that petitioners did not challenge the Tax Court's finding that the returns thus did not disclose, but instead concealed, the true nature of the transactions

(Pet. App. 22a).[7] The court reasoned that "[t]hese unexplained misrepresentations appear designed to avoid audit" (*ibid.*). Petitioners contend that, by holding them responsible for the misrepresentations in their returns, the decision below has "created confusion about when a taxpayer who relies on a competent tax return preparer acts with reasonable cause" (Pet. 22).

Contrary to petitioners' assertion, however, the court of appeals made no finding as to whether petitioners had acted with reasonable cause. The additions to tax under Section 6653(a) for intentional disregard of rules and regulations and under Section 6661 for substantial understatement of liability do not provide relief for a taxpayer who acted with reasonable cause. Indeed, the addition to tax for substantial understatement of liability applies whenever the taxpayer's position is not supported by substantial authority and was not adequately disclosed in the return. 26 U.S.C. 6661(b)(2)(B). The courts below correctly concluded that petitioners' position in this case was not supported by substantial authority and was not adequately disclosed in their returns (Pet. App. 21a-22a, 68a-69a).[8]

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[7] Cramer and Monaghan both claimed a basis in the options when they knew they had none. Cramer listed the sales in the portion of his return referring to stock and bond sales rather than the section reporting option sales. Boynton reported the option sale as a sale of stock (Pet. App. 22a, 43a-44a).

[8] Even though petitioners failed to challenge on appeal the finding that their returns concealed the nature of their transaction (Pet. App. 22a), they now claim that the disclosures in their returns were adequate to apprise the Commissioner of the transaction and that "these were the same options for which Section 83(b) elections had been filed" (Pet. 23). Even if

Section 6661(c) authorizes the Commissioner to waive all or part of the substantial understatement penalty "on a showing by the taxpayer that there was reasonable cause for the understatement (or part thereof) and that the taxpayer acted in good faith." See *Mauerman* v. *Commissioner*, 22 F.3d 1001, 1006, (10th Cir. 1994). But the Tax Court concluded, on the facts of this case, that petitioners had not acted in good faith and that the Commissioner had not abused her discretion in declining to waive the substantial understatement penalty (Pet. App. 70a-71a). The court of appeals upheld that finding, for it was amply supported by petitioners' concealment of the nature of the option sales in their returns and by their decision intentionally to disregard the governing regulations (*id.* at 22a).

b. Petitioners err in asserting (Pet. 22-23) that they should not be held responsible for errors in the manner in which the option sales were reported in their returns because they had entrusted the preparation of the returns to tax professionals. It has long been the rule that the duty of filing accurate returns can not be avoided by placing the responsibility on an agent. See, *e.g.*, *Daugherty* v. *Commissioner*, 78 T.C. 623, 641 (1982); *American Properties, Inc.* v. *Commissioner*, 28 T.C. 1100, 1116-1117 (1957),

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an examiner were actually aware of petitioners' elections, however, he would have had no way of knowing from the face of petitioners' 1982 returns that the transactions reported thereon related to the same options for which elections were filed. After all, the elections showed that petitioners had paid nothing for the options, whereas Cramer's and Monaghan's returns reported a substantial basis in options and Boynton's return reported only a sale of stock, not of options (Pet. App. 22a, 43a-44a).

aff'd per curiam, 262 F.2d 150 (9th Cir. 1958). It is particularly appropriate to hold petitioners responsible for misstatements in their returns because of the limited and erroneous information that they provided to their tax return preparers. While reasonable reliance on a tax advisor may excuse a taxpayer from the negligence penalty for failure to file a correct return, that is so only if the taxpayer establishes that he provided all relevant information to the advisor. *Accardo* v. *Commissioner*, 942 F.2d 444, 453 (7th Cir. 1991), cert. denied, 503 U.S. 907 (1992); *Pritchett* v. *Commissioner*, 63 T.C. 149, 174 (1974). The taxpayer must demonstrate that the tax return preparer was provided with the information necessary to file a correct tax return. *Pessin* v. *Commissioner*, 59 T.C. 473, 489 (1972).

In this case, however, the Tax Court correctly found (Pet. App. 64a) that the tax return preparers were not provided with copies of the IMED options and that they therefore could not form a valid opinion as to whether Section 83 applied to the options. Indeed, Monaghan testified that he instructed his return preparers (Jassoy and Wieseler) to report the option sales as a capital gain (RT (Vol. VII) at 841–842, 882–883). Jassoy was further advised that Section 83(b) elections had been timely filed for all the options and that Arthur Young had determined that both the filing of the elections and capital gains treatment were proper (Pet. App. 64a). Wieseler, for his part, was not even aware that options were involved (*id.* at 43a). Since petitioners failed to provide all relevant information to their tax return preparers, they cannot escape responsibility for misleading information in their returns by claiming that the errors were made by the preparers.

The factual contentions that petitioners raise in the petition were considered and rejected by both courts below. Further review is therefore not warranted. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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